

JUSTICE
and
WELFARE
in
DIVORCE

MERVYN MURCH

SWEET AND MAXWELL

Justice and Welfare in Divorce

by

Mervyn Murch, B.A., D.S.A., C.A.S.S.

London
Sweet & Maxwell
1980

*Published in 1980 by
Sweet & Maxwell Limited of
11 New Fetter Lane, London
and printed in Great Britain
by Fakenham Press Limited,
Fakenham, Norfolk*

British Library Cataloguing in Publication Data

Murch, Mervyn

Justice and welfare in divorce.

1. Divorce – Great Britain
2. Family social work – Great Britain

1. Title

362.8'2 KD764

ISBN 0-421-27130-2

ISBN 0-421-26400-4 Pbk

©

Mervyn Murch

1980

Justice and Welfare
in
Divorce

AUSTRALIA

The Law Book Company Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.

The Carswell Company Ltd.
Agincourt, Ontario

INDIA

N. M. Tripathi Private Ltd.
Bombay
and
Eastern Law House Private Ltd.
Calcutta
M.P.P. House
Bangalore

ISRAEL

Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa

MALAYSIA : SINGAPORE : BRUNEI

Malayan Law Journal (Pte.) Ltd.
Singapore

NEW ZEALAND

Sweet & Maxwell (N.Z.) Ltd.
Auckland

PAKISTAN

Pakistan Law House
Karachi

Acknowledgements

The research upon which this book is based could not have been done without the help of many people. My first debt is to all those who cannot be named who generously agreed to be interviewed about their experience of divorce. They did so in the hope that it would lead to improvements in divorce procedures which would spare others some of the difficulties they had had to face.

I must also thank the Social Science Research Council who financed the project and those members of the divorce court welfare service in the South-west region who encouraged me to start the research and assisted its progress by approaching divorcing couples on my behalf.

Elizabeth Elston and Jane Fuller, former research associates, played a major role in the main stages of the investigation, helping me plan the fieldwork, interviewing people with sensitivity and processing data carefully. I have greatly appreciated their systematic work when writing up the results. The cheerful endeavours of Grace Yarnell, our first secretary, did much to get the enterprise started. Audrey Morris and Jean Williams of the University of Bristol Department of Public Health kindly provided technical assistance. Others who helped at various times included Ruth Hawkins and Sue Pottle.

Tilda Goldberg, formerly Director of Research at the National Institute of Social Work, Professor Douglas Hooper, Professor Lord McGregor of Durris and Mr. Frank Terry, formerly Chief Probation Officer for Cornwall gave valuable expert advice. Roy Parker, Professor of Social Administration at the University of Bristol and head of my department has given me unwavering support. I have also received much encouragement from other colleagues including Gwynn Davis and Daphne Norbury. I am also most grateful to a number of local practitioners including David Burrows, Lisa Parkinson, Geoffrey Parmiter and John Westcott whose active interest in conciliation has taught me much.

Acknowledgements

Drafts of the manuscript were typed by Kay Bader, Margaret Borkowski, Lynne Jennings and Ray Sandler, all mastering my almost illegible handwriting. Don Low, Chief Probation Officer for Dorset and Hyacinthe Harford read the typescript and made many useful suggestions. F. E. Mostyn, my severest critic, also spent many hours reading the typescript. I cannot thank him sufficiently for his help and friendship. Whatever deficiencies or errors the book may still contain are my sole responsibility and should not be held against any of my advisers and critics.

My colleague, Margaret Borkowski, has seen the enterprise through many difficult periods while I have been preparing the material for publication. I have made heavy demands on her skill, friendship and tolerance, particularly when through my own shortcomings disaster loomed. I also owe a great deal to my former colleague, Val Walker, who relieved me of many pressures when I was writing the main text. I cannot thank her enough for her kindness, support and forbearance and for the considerable contribution she has made to my understanding.

Finally, I must acknowledge a special debt to Anne Murch and to my three children, Lorna, Julia and Duncan. For some years their lives have been disturbed by my work, and they have accepted it with grace and stoicism. This book, whatever its merits, will be little compensation for them.

*Bristol,
November 1, 1979*

Mervyn Murch

Contents

<i>Acknowledgements</i>	v
<i>Introduction</i>	1
 <i>Part 1: The Role of Solicitors in Divorce Proceedings</i>	
1. The Role of Solicitors in Divorce Proceedings	11
 <i>Part 2: The Role of the Divorce Court Welfare Officer</i>	
2. Preconceptions of Parents	45
3. Encounters with Welfare Officers – Parents’ Experience	51
4. Family Reorganisation: Access	67
5. Family Reorganisation – Telling the Children	96
6. Dissatisfaction with Welfare Officers	110
7. Welfare Reports – Should Parents See Them?	118
8. Implementation of Welfare Officers’ Recommendation	129
9. Should Divorce Court Welfare Officers be Drawn from the Probation Service	140
10. The Future – Towards a Family Court Welfare Service	145
11. An Appraisal of the Court Welfare Task	156
 <i>Part 3: Policy Considerations</i>	
12. The Welfare Approach to Divorce – from Marriage Saving to Child Saving	185
13. The Judicial Approach to Divorce – Recent Trends and Their Implications for Court Welfare Practice	209
14. Participant Justice	219
15. The Advance of Family Courts – Reality or Mirage	230
 <i>Part 4: The Future</i>	
16. A Scheme for Participant Justice	251

Contents

17. The Reorganisation of Court Welfare Work	268
18. Conclusion	283
<i>Appendix: Social Characteristics of Families Studied</i>	287
<i>Index</i>	301

Introduction

This book examines the relationship between legal and welfare practices in divorce proceedings involving children. It is intended for lawyers and social workers and anyone else concerned with the methods by which law and social policy seek to regulate family life.

When I began to write it my intention was merely to set out the findings of a research project conducted in 1973 and 1974 which sought to discover the way divorcing parents viewed the solicitors who represented them, the court welfare officers who compiled reports about them, those who made judgments in the court, and the legal institutions which authorised these things.¹ Later I came to realise that some evaluation of the whole machinery of divorce was needed. Since the extension of the special procedure to all undefended divorce suits in April 1977 and certain restrictions on the provision of Legal Aid, divorce court practice has undergone a fundamental reorientation in which child welfare considerations have assumed far greater prominence than previously. Even before these new procedures, which in part were influenced by an earlier publication arising from this research,² a debate had developed about the way courts of the future should deal with family matters and about the extent of their welfare responsibilities. The fundamental questions are: should the state investigate the way couples exercise their parental responsibilities when they are in the process of divorce? Should the judicial machinery offer divorcing parents help to reach decisions about their family's future? If so at what point? Should the courts in the exercise of their duty to protect the interests of children be empowered to keep families under a degree of surveillance? How are the rights and interests of parents and children to be safeguarded now that judges and welfare officers have greater discretionary power to intervene in and control family life? In recent years the law has grappled with all these questions and the introduction of the special

procedure³ is the latest of a number of piecemeal developments which is determining the character of its response.

The debate is not over. It has great social importance. Since the mid 1960s there has been an astonishing increase in divorce. In 1965 there were 42,070 divorce petitions filed. By 1970 the number had risen to 70,575.⁴ Seven years later the total had more than doubled to reach a figure of 167,034.⁵ The divorce rate per 1,000 of the married population has increased from 3.1 in 1965 to 6.0 in 1970 and to 9.6 in 1975.⁶ One authority has estimated that on current trends approximately a quarter of all marriages now taking place will terminate in the divorce court.⁷

Not only adults but large numbers of children are also involved, since two-thirds of those who divorce have dependent offspring. At current levels, even assuming no further increase, the parents of 152,170 children under 16 are likely to divorce every year, nearly half the children being at primary school.⁸ This compares with a figure of only 71,336 in 1970.

These figures imply a remarkable amount of family disruption and reorganisation. Approximately 75 per cent. of those who divorce remarry within four years of obtaining a decree absolute. More than 25 per cent. of all marriages solemnised in 1975 contained one or both parties who had been previously divorced.⁹ Divorce is not simply to be understood in terms of ending marriage but also as a licence to remarry. The resulting changes in the family's social structure, as old relationships are given up or modified and new ones established, are not well understood. The evidence presented in this book casts light on the nature of some of these changes, particularly as they concern children.

The rapid growth of divorce has serious implications for the legal institutions that administer family law. Financially the costs are considerable: the cost of civil legal aid and advice rose sharply from £11.5 million in 1971-72 to £34.5 million in 1976-77, the greater part of which was spent on matrimonial cases.¹⁰ Attempts have been made to restrict this monetary expenditure,¹¹ but the true cost to the community of marital breakdown is obviously much greater. More judges, lawyers, doctors, school teachers, social workers, as well as people engaged in other kinds of social service become necessary as the increasing divorce population enlists the aid of various types of

support in their attempts to contain, resolve or escape from the tensions of unhappy and stressful marriage.

Rapidly changing social values concerning marriage, the status of women and the role of the family in society profoundly affect the character of divorce proceedings. In recent years emphasis has moved away from preoccupation with the history of a broken marriage towards a greater concern for the family's future. These days the authorities recognise the importance of ensuring that the parties should reach an acceptable reallocation of their resources and responsibilities, through negotiation or settlement. This is better than apportioning guilt and innocence. Modern divorce is about the division of money and property and the future care of the children. This raises complex and interrelated questions of law, welfare and social policy. The difficulty is that there has been no comprehensive legislation to take account of these changes. In particular the procedural machinery of the law has been slow to adapt to them. It is therefore not surprising that the practice and policy of divorce law has entered an era when it is being reappraised and challenged. A lot of rethinking on the matter was undertaken by the *Finer Committee on One-Parent Families*.¹² Its report may prove to be one of the most important official documents concerning the institutions of marriage and divorce produced this century, not least because it eschewed high sentence and rhetoric and instead sought the facts. It appreciated what McGregor had pointed out in 1957,¹³ that without empirical evidence "one cannot pass from the contemplation of unsupported conjecture to the study of reality." The *Finer Committee's* proposals, which included combining and rationalising the separate jurisdictions of the magistrates court and the divorce court into a new system of family courts, were supported by well-reasoned and compassionate arguments. The Committee's strong endorsement of family courts was the latest of a whole line of similar recommendations from other committees (Payne,¹⁴ Latey,¹⁵ Houghton¹⁶). It went further than them, both in the strength of its endorsement of the principle and in its examination of feasibility. Yet it did not consider the full implications of the development of the welfare services in the divorce court, partly because this was not fully within its terms of reference, and partly because relevant

evidence was not at the time available. The book tries to rectify this.

The recent growth of the divorce court welfare service highlights some of the strengths and weaknesses of the judicial system. It is coming to be realised that the interests of welfare and justice do not always coincide; indeed their pursuit sometimes reveals fundamental conflicts of philosophy. I have tried to explore this issue and to show that failure to acknowledge the nature of this conflict has been one obstacle in the way of reform.

One might think, as Meyer and Timms have pointed out,¹⁷ that administrators and policy makers would need to know at least something about the responses and reactions of those for whom services are intended. Yet, in general, until about 10 years ago there was little available information about consumer experience or opinion. When the research reported in this book was planned in 1970, a review of the available literature showed that it was almost totally lacking in consumer views of the legal and social services associated with divorce. The study of matrimonial proceedings in magistrates courts by McGregor, Blom-Cooper and Gibson pointed to the value of this kind of research, though their own sample was drawn from readers of the *News of the World* newspaper and might have been unrepresentative.¹⁸ Few, if any, systematic studies had made the parties' reactions to the machinery of divorce the primary focus of investigation. Most researchers had approached divorce tangentially, either in the context of poverty studies or in terms of psycho-social adjustment. Similarly, most legal writing had examined divorce in the light of substantive law and social philosophy. Although since the 1939–45 War there had been a strong reformist lobby that drew support from groups of social scientists and lawyers alike, much of their work had been carried out, as Farrar had said:

“On the basis of a *a priori* assertion or intuitive assessments of social facts and consequences.”¹⁹

It is hard to say why lawyers and social workers have been slow to appreciate the value of consumer feedback. Meyer and Timms suggest that as far as social work is concerned there are a number of reasons; first, that social work thinking in the

post-war period was heavily influenced by psycho-analytic ideas which encouraged practitioners to discount or explain away any views the client might express; secondly, the drive towards professionalism in social work encouraged the belief that through skills derived from a body of abstract knowledge, practitioners knew better than clients what was good for them; and thirdly, that because social work clients are typically isolated from each other, client grievances are apt to remain private and unexpressed. These last two points apply equally to legal services. Also criticisms from lay persons about legal practice can too easily be dismissed as the result of ignorance. The mystifying effects of legal language and complexity may serve to protect the system from consumer complaint. However, lack of feedback from the public can keep lawyers ignorant of consumer approval.

The consumer views reported in the first 10 chapters of this book were gathered during the course of two surveys conducted for a research into the circumstances of families in divorce proceedings carried out under my direction during 1973 and 1974.²⁰ The people who assisted the planning of this research, including a small group of chief probation officers in the South-west, thought that the views of those on the "receiving" end of legal and social services associated with divorce were likely to be significantly different from those of the practitioners who provided the services, and would have their own validity. Both surveys sought to sample the impressions and opinions of parents who had recent experience of divorce. The first comprised 102 petitioners (71 women and 31 men) drawn representatively on a one-in-three basis from a total of 470 undefended divorce cases heard in three local county courts. A response rate of 70 per cent. was obtained, 22 per cent. refused and a further 8 per cent. could not be traced. The second sample was more specialist. It was obtained from 41 divorcing couples known to court welfare officers in three South-western counties. It is therefore only representative of those cases in which child welfare reports were prepared for the court. These parents were invited to participate in the research by the welfare officers only after the enquiries for the court had been completed. The welfare officers reported that approximately 70 per cent. of those parents approached agreed to take part.

I have used the evidence of these surveys as the raw material upon which to base my examination of the system. I have also tried to set the research data in the context of more recent trends in family litigation and other documentary material. I am however conscious of the limitations of the evidence; it answers some questions but not others. Although drawn as representatively as possible, the samples were comparatively small and local in character. Petitioner parents were better represented than respondents. The views of children were by no means adequately represented. To get some idea of the range of practitioners' views I have had to refer to published sources. Professional writing by practitioners, while offering valuable insight into some of the problems, may not be representative for obvious reasons. A further difficulty is that the judicial system is dynamic and constantly changing, albeit not as fast, or in the direction that some would wish. Finally, I have been faced with a constant problem of up-dating my material as the book has been prepared. Despite these shortcomings my purpose has been to tease out from the available material those features of legal and welfare practice which seem to have the most important implications for the future. Some of my own professional thinking and subjective value judgments will inevitably influence the conclusions I have drawn. To those who might disagree I would merely ask that they do not judge the weight of the research evidence presented on the basis of my own idiosyncratic deductions. I invite such readers to let the evidence speak for itself and to accept that the book was written in the hope that it would contribute to the debate concerning the manner and means by which family life should be reorganised when marriages break down.

NOTES

1. This was sponsored by the SSRC and carried out from the Department of Social Administration of the University of Bristol. A full report of the project is obtainable from the British Lending Library.
2. E. Elston, J. Fuller, M. Murch, "Judicial Hearings of Unfounded Divorce Petitions" *Modern Law Review*, November 1975.
3. The Matrimonial Causes Rules 1977 (S.I. 1977 No. 344 (L.6)).

4. *Civil Judicial Statistics*, Cmnd. 5756 (1973) (HMSO, 1974), Table 10.
5. *Judicial Statistics*, Cmnd. 687 (1976) (HMSO, 1977), Table G.6.
6. Office of Population Census and Surveys, *Marriage and Divorce Statistics* (HMSO, 1978), Series FM2 No. 2, Table 4.1a.
7. R. Chester, *Divorce in the Nineteen Sixties* (Marriage Guidance, March 1972), p. 38.
8. Office of Population Census and Surveys, *Marriage and Divorce Statistics 1976* (HMSO, 1979), FM2 No. 3, Table 4.5.
9. Office of Population Census and Surveys, *op. cit.*, Table 3.2.
10. Lord Chancellor's Office, 26th Legal Aid Annual Report (HMSO, 1976), p. 64.
11. Lord Chancellor's Office, 28th Legal Aid Annual Report (HMSO, 1979), p. 82.
12. Report of the Committee on One Parent Families, Cmnd. 5629 (HMSO, 1974).
13. O. R. McGregor, *Divorce in England* (Heinemann, 1957), p. 187.
14. Report of the Committee on the Enforcement of Judgement Debt, Cmnd. 3909 (HMSO, 1969).
15. Report of the Committee on the Age of Majority, Cmnd. 3342 (HMSO, 1967), p. 68.
16. Report of the Departmental Committee on the Adoption of Children, Cmnd. 5107 (HMSO, 1972).
17. J. E. Mayer and N. Timms, *The Client Speaks* (Routledge & Kegan Paul, 1970).
18. O. R. McGregor, L. Blom-Cooper, C. Gibson, *Separated Spouses* (Duckworth, 1970), p. 48.
19. J. H. Farrar, *Law Reform and the Law Commission* (Sweet and Maxwell, 1974).
20. A fuller description of the objectives of this research and the methods used will be found in the report lodged in the British Lending Library. It is omitted from this book in order to save costs.

